86-1106

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD J. BECK,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

James S. Coon
IMPERATI, BARNETT,
SHERWOOD & COON, P.C.
135 S.W. Ash, Suite 600
Portland, OR 97204
(503) 221-0077

38 pp

QUESTION PRESENTED FOR REVIEW

Whether a federal court of appeals on substantial evidence review may base its decision on a fact never found by any decision maker below nor argued by any party nor supported by anything in the record.

Petitioner requests summary reversal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD J. BECK,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit dated October 7, 1986.

OPINIONS BELOW

The United States Court of Appeals for

the Federal Circuit affirmed the decision of the Merit Systems Protection Board (MSPB) in this single air traffic controller appeal. Respondent had discharged petitioner from his employment, and a presiding official of the MSPB reversed that termination. The MSPB reversed the presiding official, reinstating petitioner's termination. The court of appeals affirmed the MSPB. None of the decisions below is reported.

JURISDICTION

The court of appeals' initial decision was issued August 19, 1986, the petition for rehearing was denied October 7, 1986. This court has jurisdiction under 28 USC §1254(1).

STATUTES INVOLVED

Title V, United States Code, Section 7703(c) provides as follows:

> In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall

> review the record and hold unlawful and set aside any agency actions, findings, or conclusions found to be --
>
> * * *
>
> arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...

5 USC §7703.

Title V United States Code, Section 7311 provides:

> An individual may not accept or hold a position in the Government of the United States. . .if he --
>
> * * *
>
> (3) participates in a strike, or asserts the right to strike against the Government of the United States. . .

5 USC §7311.

STATEMENT OF THE CASE

Petitioner Richard J. Beck went to work for the FAA in 1970. He was described by his supervisors and co-workers as a hard worker, intelligent, critical, and above all, an individual. TR III, 32, 49-52, 72-75; TR I, 225-26. Mr. Beck's supervisor, Mr. Bullock,

described him as one who "would follow his own line" and who was neither a leader nor a follower but rather "by himself". TR 1, 225-26. Mr. Beck was never a member of the Professional Air Traffic Controllers Organization (PATCO) and never signed any strike pledge, never walked any picket line or otherwise participated in or supported the strike which began on August 3, 1981. TR III, 41. Indeed, several union members admitted harassing petitioner because of his non-union status, and Deputy Portland Tower Chief Bracy testified that the union twice posted petitioner's name on a list of new union members, and petitioner took his name down. Further, according to Deputy Chief Bracy, while a number of other controllers were working at less than capacity before the strike, petitioner continued always to work at his normally high capacity. TR I, 132, 135, Petitioners' Ex. 5C, D.

Before the air traffic controllers' strike of August 3, 1981, petitioner's schedule provided that he was to work August 3, 4 and 5 and have regular days off and annual leave thereafter until 3:00 p.m. on August 15. Thus, under President Reagan's "grace period", petitioner's "deadline shift" -- the shift at which he needed to return to avoid termination of his employment -- was on August 15 at 3:00. Petitioner had planned his annual leave in early August, 1981, to finish a well drilling project under contract to a local school district, and he used the time for that purpose. TR III, 73. He testified without contradiction that he had always intended to return to work as scheduled on August 15, and the presiding official found his testimony credible. TR III, 59-60; Presiding Official Initial Decision at 14-16.

The presiding official found petitioner

was neither absent without leave nor guilty of participating in the PATCO strike. Initial Decision at 42. The MSPB reversed, with member Devaney dissenting from his colleagues' disregard of the presiding official's credibility determinations.

Petitioner filed for review in the court of appeals. The court issued a decision affirming the MSPB on a basis previously unknown to the case -- that petitioner's annual leave had been cancelled by telephone. Because this was a clear misapprehension of the factual record, petitioner requested rehearing. The Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

The court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

This petition raises no conflict among state or federal courts nor, one hopes, any issue likely to recur with great frequency. Petitioner does not request plenary briefing and argument because the decision of the court of appeals is so patently improper as to require only a summary exercise of this Court's supervisory power. However, in spite of its small apparent significance, this case presents such an obvious and grotesque disregard of the facts and law that this Court should exercise that power.

Petitioner reported to work as an air traffic controller as scheduled at the end of his annual leave. The agency refused his offer to work and made several arguments to

justify its position, but never, at any level, suggested that petitioner's annual leave had been cancelled. There was no evidence anywhere in the record to support such an argument.

The presiding official found petitioner's annual leave had not been cancelled. The MSPB did not address this finding. But the court of appeals based its decision on its statement that

> Mr. Beck acknowledges that he was advised by a telephone call from his facility that his annual leave was being cancelled. . ..

Mr. Beck made no such statement. There is nothing whatever in the record to support a finding that petitioner's annual leave was ever cancelled or that he ever acknowledged such a cancellation. The government has made no such argument.

This factual error controls petitioner's case. If his annual leave was cancelled, his

"deadline shift" would have passed by the time he reported for duty. If not, he reported on time.

It appears that the court of appeals simply made a mistake in its initial ruling in this case. Because of the volume of the air traffic controller cases, the court has tried to decide "lead cases" to control the bulk of remaining cases, and a finding that petitioner's leave had been cancelled was necessary to fit this case within the rule of Letenyei vs. Department of Transportation, 735 F.2d 528 (Fed. Cir. 1984), on which the court relies. Such a procrustean error is understandable in the first instance. However, it is difficult to imagine a justification for denying rehearing after the court's clear factual error was pointed out. Certainly the court gave none.

The court of appeals may not make its own factual findings. It exists to review,

among others, the decisions of the MSPB. 5 USC §7703(c). It is required to do justice in the cases of former air traffic controllers as in those of other federal employees. Petitioner is entitled by law to a review of his case by the court of appeals. 5 USC §7703. That review is not discretionary. The court of appeals does not discharge its duty by recognizing petitioner's case as just another air traffic controller case, somehow less worthy of consideration because of the size of its cohort. The court of appeals has not considered the merits of this case. It has made a decision so unrelated to the facts of the case that it is not a decision in this case at all. It is a decision in the Letenyei case.[1]

---

[1] The court of appeals relied on the first Letenyei decision. However, the result in Letenyei was not an affirmance but a vacation and remand for further evidence on

Petitioner realizes this case is not typical of those in which certiorari is ordinarily granted. The absence of a conflict among circuits or states or any substantive question of broad implication counsels against plenary consideration. However, in a time when increasing court backlogs demand new judicial approaches to docket management, the risk of perfunctory adjudication must be taken into account. There were, to be sure, over 10,000 former air traffic controllers in hundreds of individual and consolidated appeals to the federal circuit. While this fact led unavoidably to some delay, there is no reason it should have led to patently incorrect results and a refusal to correct such results on rehearing. This court is repeatedly asked to draw lines beyond which adjudicators may

---

the question of intent.

not go in sacrificing justice to convenience. If this is the case in which to draw such a line for mass adjudication, certiorari should be granted for plenary review. If not, the decision of the court of appeals should be summarily reversed.

CONCLUSION

Certiorari should be granted, the decision of the court of appeals vacated and the case remanded for reconsideration.

Respectfully submitted this 2nd day of January, 1987.

IMPERATI, BARNETT, SHERWOOD & COON, P.C.

S/JAMES S. COON

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appendix Index

APPENDIX A

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RICHARD J. BECK,	)	
	)	
Petitioner,	)	Appeal No.
	)	85-1109
vs.	)	
	)	
DEPARTMENT OF TRANSPORTATION, FAA,	)	
	)	
	)	
Respondent.	)	

Before FRIEDMAN, SMITH, and BISSELL, Circuit Judges.

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

FRANCIS X. GINDHART, Clerk

10/7/86
(Date)

cc: Mr. Samuel J. Imperati
Ms. Sandra P. Spooner, DOJ

APPENDIX B

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RICHARD J. BECK	)	
	)	
Petitioner,	)	Appeal No.
	)	85-1109
vs.	)	
	)	MSPB
DEPARTMENT OF TRANSPORTATION,	)	Docket No.
FAA,	)	SE075281F0400
	)	
Respondent.	)	

DECIDED: August 19, 1986

Before FRIEDMAN, SMITH, and BISSELL, Circuit Judges.

PER CURIAM.

DECISION

The final decision of the Merit Systems Protection Board, reversing the presiding

official and affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is affirmed.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed. R. App. P. 34(a).

This appeal raises no issue not resolved in, and presents no fact pattern which differs significantly from that in Anderson vs. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S.

Ct. 432 (1984); and Letenyei vs. Department of Transportation, FAA, 735 F.2d 528 (Fed. Cir. 1984).

Mr. Beck acknowledges that he was advised by a telephone call from his facility that his annual leave was being cancelled and that he soon thereafter called back and asked to be placed on sick leave. He contends that his request for sick leave was improperly denied. The board properly considered the evidence on this issue and we agree with the finding of the board.

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. § 7703(c) (1982); see Hayes vs. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

APPENDIX C

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RICHARD J. BECK,[1]	)	
	)	
vs.	)	Docket No.
	)	SE075281F0400
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMIN.	)	
	)	

OPINION AND ORDER

The agency timely petitioned for review from the initial decision of the Board's Seattle Regional Office which reversed the removal action against appellant, a former Air Traffic Control Specialist.[2] The agency

---

[1] The appeals of three appellants were consolidated for hearing in this matter, and two initial decisions resulted. Although the initial decision under review here covered two appeals, only appellant Beck is subject to this Opinion and Order.

[2] Appellant has questioned whether the agency's petition was timely filed. The evidence establishes that the petition was placed in the mail on February 23, 1983, at the main post office in Washington, D.C., and

had based the removal on charges of participation in an unlawful strike against the Federal government and unauthorized absence (AWOL) on August 3 through August 5, 1981.[3]

The presiding official found that appellant rebutted the agency's prima facie case of strike participation by showing that appellant did not intend to participate in the strike,[4] that his absence was due to

---

was sent by certified mail. The agency met the Board's filing deadline. See Beer vs. Department of the Army, 2 MSPB 226 (1980).

[3] The appellant was issued a notice of proposed removal on August 7, 1981, which charged him with striking and AWOL beginning on August 3, 1981, and continuing "to the present." As appellant had regularly scheduled days off on August 6 and 7, 1981, the charges incorporate August 3, 4, and 5, 1981.

[4] In Ketcham vs. Department of Transportation, MSPB Docket No. DA075281F0713 at 4-5, 9 (May 28, 1982), motion for clarification denied (November 23, 1982), the Board took official notice that a strike by air traffic controllers began on August 3, 1981, and continued at least through August

reasons other than strike participation, and that the agency improperly denied appellant's good faith requests for sick leave on August 3, 4 and August 5, 1981. See Initial Decision (I.D.) at 8. Relying on the finding that sick leave was improperly denied, the presiding official found that the appellant was neither a strike participant nor AWOL in August, 1981, and reversed the removal. In making this finding, the presiding official fount it unnecessary to determine whether appellant was in fact incapacitated. Id. at 19-22. The agency contends that the presiding official erred in finding that appellant rebutted the agency's prima facie case of strike participation, that he did not consider the evidence properly, and that he misconstrued applicable regulatory standards pertaining to sick leave. The agency's

---

6, 1981.

petition for review is GRANTED.

The agency asserts that it established a prima facie case of appellant's strike participation, under the guidelines established in Schapansky vs. Department of Transportation, MSPB Docket No. DA075281F1130 (October 28, 1982), and that the appellant has failed to rebut this showing.[5] We have reviewed the record in this case and we find that the presiding official erred in his analysis of whether appellant rebutted the prima facie case.

Appellant was only entitled to sick

---

[5] In Schapansky, supra, at 6 n.2, we noted that where the existence of a strike is a matter of general knowledge, an agency may establish a prima facie case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike. The burden then shifts to the appellant to present evidence showing that he was without knowledge of the strike or that his absence from duty was due to some other factor. However, the agency bears the burden of ultimately proving by a preponderance of the evidence that the appellant had participated in the strike. Id.

leave if he was, in fact, incapacitated for duty. See 5 C.F.R. § 630.401(1); Davis vs. Department of Transportation, MSPB Docket No. NY075281F1305 (July 12, 1983). Therefore, the agency's action in denying appellant's sick leave was not necessarily improper. While the presiding official found it unnecessary to do so, we find it is necessary to determine if appellant was, in fact, incapacitated for duty on August 3-5, 1981. Furthermore, we find that our review of the record in this case does not establish that appellant was incapacitated for duty.

At the hearing, the appellant was asked whether he was under any disability on August 3-5, 1981, which prevented him from performing the duties of a Federal Aviation Administration employee. The appellant stated under oath that he was not incapacitated from performing the duties. See hearing Transcript III (H.T.) at 94-95.

Appellant went on to indicate he believed he would not be able to properly perform the duties of an air traffic controller due to the stress he was experiencing. Id. at 96. Thus, under oath, the appellant presented seemingly contradictory statements concerning his ability to perform his duties.

Appellant's wife testified that appellant was experiencing stomach problems during the week of the strike in August, 1981. See Id. at 13-15. Appellant's psychologist, who had treated appellant over a three year period, testified that he believed appellant was disabled on August 3-5, 1981, although the psychologist had not seen the appellant since June, 1981. The testimony of appellant, his wife, and his psychologist supports, at least to a degree, appellant's claim of incapacity. H.T. IV at 72.

However, the appellant also made

statements that indicated he intended to support the strike in order to avoid controversy with other controllers. H.T. III at 100-101; H.T. I at 18. He further indicated he avoided contacting the agency because he feared his annual leave for August 8 through 12 would be cancelled. H.T. III at 129. Appellant stated he was, in fact, AWOL on August 3-5, 1981. Id. at 57. On August 6, 1981, appellant commenced work on a well-drilling project, and was not apparently prevented by his physical condition from embarking on this project, even though he described it as very physical work. Id. at 59.

Upon review of all the evidence, we do not find that appellant was incapacitated for duty on August 3-5, 1981. Rather, the evidence indicates that appellant chose to withhold his services in support of the illegal strike called by fellow air traffic

controllers. We therefore find that the agency established that appellant was AWOL during the strike and that appellant has not rebutted this prima facie case of strike participation under the guidelines established in Schapansky, supra.

Having determined that appellant was not incapacitated, we must reach a second issue which the presiding official failed to reach. On August 3, 1981, President Reagan established a "deadline shift" for striking air traffic controllers. For each controller, the "deadline shift" was the first scheduled work shift which began at or after 11:00 a.m. (8:00 a.m. Pacific time) on August 5, 1981. See Kays vs. Department of Transportation, MSPB Docket No. CH075281F2014 at 2 n.3 (April 25, 1983). Striking air traffic controllers who returned to work on their "deadline shift" were not subjected to disciplinary action for their strike activity

previous to the deadline. See Ervin vs. Department of Transportation, MSPB Docket No. SL075281F0211 (July 6, 1983). The agency contends that it changed the starting time of appellant's shift for August 5, 1981, from 7 a.m. to 8 a.m. The time noted is for the Pacific time zone. This alleged change would determine whether appellant's "deadline shift" was on August 5, 1981 , or on August 15, 1981, the date of appellant;'s first shift after August 5. Thus, we must determine whether appellant's deadline shift was, in fact, changed.

In a telephone conversation on August 5, 1981, at approximately 6:35 a.m., appellant was informed by a supervisor to be at work by 8:00 a.m. on that date. Id. at 111. While appellant was originally scheduled to work at 7:00 a.m., we find that the telephone message was an effective change of shift for appellant. In making this determination, we

note that due to the operational emergency which existed at the onset of the nationwide strike by air traffic controllers, the specific instruction to the appellant to report to work at 8:00 a.m. was a logical and suitable method to change appellant's shift. See Bangarter v. Department of Transportation, MSPB Docket No. SL075281F0279 at 20 (September 27, 1983). The supervisor testified that he instructed the appellant to report at 8:00 a.m. in order that the facility's staffing needs were met. See H.T. II at 60. Therefore, appellant's deadline shift commenced at 8:00 a.m. on August 5, 1981, and his unauthorized absence on that shift justified the agency's action of commencing disciplinary measures. Cf. McPartland vs. Department of Transportation, MSPB Docket No. DA075281F1018 (February 8, 1983).

Accordingly, the initial decision is

hereby REVERSED, and the agency's action removing appellant is hereby SUSTAINED. This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United states Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

February 17, 1984 Robert E. Jaylan

Washington, D.C.

Attachment: Statement of the Board's policy on service of its opinions and orders.

-- Attachment --

SERVICE OF BOARD OPINIONS
AND ORDERS

Under Federal regulations set forth at 5 C.F.R. §1201.26(b)(1), the Board has discretionary authority to determine the persons to be listed in a certificate of service of a Board decision. The Board has determined to serve the decision in this case on both the appellant personally and the appellant's representative. An earlier notice which the parties may have received from the Secretary of the Board appears to suggest that the law requires service upon the appellant personally at his or her personal address. The Secretary's statement is incorrect and should be disregarded. To ensure a timely filing with the court, the 30-day time limit should be calculated from the date this decision is first received, whether by the appellant or the representative. The court has not yet decided whether service on the appellant or the representative controls the time for an appeal to the court.

OPINION OF BOARD MEMBER DENNIS M. DEVANEY

DISSENTING FROM THE OPINION AND ORDER

Based on testimony of the witnesses and other evidence in the record, the presiding official determined that appellant had rebutted the agency's prima facie case of strike participation. See Schapansky vs. Department of Transportation, MSPB Docket No. DA075281F1130 (October 28, 1982). The presiding official found that, based on the testimony of appellant,s his wife, and his psychologist, appellant was unable to control air traffic and was therefore improperly denied sick leave for August 3 through August 5, 1981.[1] This determination was grounded on

---

[1] Under the terms of President Reagan's amnesty speech as implemented by the Federal Aviation Administration, the deadline shift for air traffic controllers was established as the first scheduled shift on or after 11:00 a.m. E.D.T, August 5, 1981 (8:00 a.m. P.D.T.). Appellant's scheduled 7:00 a.m. P.D.T. shift on August 5, 1981 was therefore not his deadline shift. The majority errs in finding that the August 5, 1981, shift was

credibility assessments of the witnesses by the presiding official.

The agency's petition for review attacks the presiding official's evaluation of the evidence. The majority grants the petition and undertakes a de novo review of witness statements. Relying on this "reassessment" of the record, the majority finds an internal inconsistency in appellant's testimony. Opinion and Order at 3. In so doing, my colleagues disregard the well-reasoned factfinding of the presiding official who personally observed the demeanor and presentations of the witnesses as hearing level adjudicator.

Second guessing the presiding official on credibility issues in this type of case

---

his deadline shift. The agency issued the proposed notice of removal prior to appellant's actual deadline shift, i.e., August 15, 1981. This action constitutes reversible error by the agency and represents an independent reason to reinstate appellant.

runs directly counter to the sound judicial policy articulated by the Board in Weaver vs. Department of the Navy, 2 MSPB 297, 299 (1980) (The Board must accord due deference to credibility determinations and related factfinding by presiding officials).

Therefore, I respectfully dissent.

February 17, 1984
(Date)

Dennis M. Devaney
Member

Washington, D.C.